WONG CHIOU YONG

v.

PENDAFTAR BESAR/KETUA PENGARAH JABATAN PENDAFTARAN NEGARA

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[ORIGINATING SUMMONS NO: 24-734-2003]
4 NOVEMBER 2004

CIVIL PROCEDURE: *Declaration - Application by transsexual - To declare herself as male and to direct respective authorities to amend birth registration accordingly - Whether registrar of birth was right in refusing to correct registration on grounds of error - Whether initial entry in registration reflected true gender at time of birth - Whether legislation in respect of transsexuals found lacking - Births and Deaths Registration Act 1957, s. 27(1), (2), (3) - National Registration Act 1959, s. 6(2)(o)*

The applicant herein was registered at birth under the Births and Deaths Registration Act 1957 ('Act 1957') and the applicant's IC was issued in accordance with the National Registration Act 1959 ('Act 1959'). The applicant underwent a sex reassignment surgery from female to male and it followed that an application was made to the Register General of Births and Deaths to amend the applicant's birth certificate ('BC') and national registration identity card ('IC') to reflect this change in gender. The application was made on the ground that there was an error in the entry of the register book. In support of the application, the applicant's father affirmed an affidavit stating that the applicant was born with two sex organs and that a sex reassignment surgery was done on the applicant. The application was rejected. Hence this application by the applicant for a declaration to be declared as a man and to direct the respondent to amend or correct the applicant's BC and IC accordingly.

Held (dismissing the application):

[1] The relevant legislation that the birth register may be amended only if an error was made in the initial registering of the birth is s. 27 of Act 1957. The other relevant legislation is s. 6(2) of Act 1959. In the present case, there was no error in the sex of the applicant as initially entered in the BC and thereafter in the IC. There was no medical examination that there was a mistake in fact or substance at the time of the registration of

birth. In fact the biological change on the applicant was by medical or surgical means and this was supported by the applicant's own evidence and materials produced before this court. (pp 626 h, 627 a & 635 a-c)

[2] A person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken. Further, the words "man" and "female" in the relevant documents do not include persons of reassigned sex and should not be contrary to the biological characteristics of the person when born. (p 635 d-e)

[3] The reassignment surgery did not affect the status of the applicant's true gender at the time of birth. The BC and IC were issued in accordance with the original identity of the applicant at the time of birth. Further, this court had no power to grant the application on the ground that there was a gender reassignment surgery. There was also no express legislation to re-register the gender of a transsexual or register a transsexual under the guise of any error or fact or substance in the register pursuant to s. 27(3) of Act 1957 and s. 6(2) of Act 1959. An entry in the register book, too, is regarded as a record of fact at the time of birth and the BC constitutes a document revealing not current identity but historical facts. (pp 635 f-h, 636 a-c & 639 f)

[4] The criteria for determining the sex of a child to be registered is not laid down in Act 1957 or in any regulation made thereunder. The practice of the registrar general is to apply exclusively the biological criteria, chromosomal, gonapal, and genital sex as informed by the parents or guardian of the child. The fact that later in life the person's "psychological sex" is at variance with its biological constituents cannot be considered to invoke s. 27(3) of Act 1957 so as to imply that the initial entry was a factual error. A change in the initial entry will be contemplated in the following circumstances, namely, in cases of clerical error, error of fact or substance; wrong identification of the apparent and genital sex of the child at the time of birth; where the biological criteria are not congruent. (p 640 d-f)

[5] Parliament could not have envisaged the type of grievance faced by the applicant when Act 1957 and Act 1959 was introduced. The decision to be made on this application should not conflict with the spirit and intention of the legislature as expressly stipulated in Act 1957. There was also no evidence that the applicant acquired all the biological characteristic of the assigned sex after the reassignment surgery. (pp 641 b-c & 645 c)

[6] Although transsexuals cannot be left in legal limbo as to their status in gender, their remedy lies with Parliament and not the courts. Any fact to be changed in the respective registration in respect of their gender must be introduced by an Act of Parliament and cannot be made by judicial pronouncement. (p 646 c-d)

Case(s) referred to:

Attorney-general For The Commonwealth And 'Kevin' And 'Jennifer' And Human Rights And Equal Opportunity Commission [2003] Fam CA 94 ***(not foll)***

Bellinger v. Bellinger [2003] 2 All ER 593 ***(foll)***

Black-clawson International Ltd v. Papierwerke Waldhof-aschaffenburg AG [1975] 2 WLR 513 ***(refd)***

Cartledge & Ors v. E Jopling & Sons Ltd [1963] AC 758 ***(refd)***

Corbette v. Corbette [1970] 2 All ER 33 ***(foll)***

Corocraft Ltd & Anor v. Pan American Airways Inc [1969] 1 QB 616 ***(refd)***

Guaranty Trust Company Of New York v. Hannay & Co [1915] WN 38 ***(refd)***

Hong Leong Enterprise Sdn Bhd v. Liew Fook Chuan & Anor Appeal [1997] 1 CLJ 665 (CA) ***(refd)***

Ikebife Ibeneweka & Ors v. Peter Egbuna & Anor [1964] 1 WLR 219 (PC) ***(refd)***

Julius v. Bishop Of Oxford 5 App Cas 214 ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 MLJ 180 ***(foll)***

Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v. Transport Workers' Union [1971] 1 MLJ 102 ***(refd)***

Lee Boon Tuan v. PP [1960] 26 MLJ 179 ***(refd)***

Letchumanan Nagappan v. Nadarajah [1993] 4 CLJ 253 HC ***(refd)***

Lim Ying v. Hiok Kian Ming Eric [1992] 1 CLJ 569; [1992] 4 CLJ (Rep) 442 HC ***(foll)***

Loh Wai Kong v. Government Of Malaysia & Ors [1978] 2 MLJ 175 (HC), [1979] 2 MLJ 37 (FC) ***(foll)***

Mohamed Noor Othman & Ors v. Mohamed Ismail Hj Ibrahim & Ors [1988] 3 MLJ 82 ***(refd)***

MT v. JT 355 A 2nd 204 [1976] ***(refd)***

R Ramachandran v. The Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

R v. North West Lancashire Health Authority, ex p A And Others [1998] QBD ***(refd)***

R v. Cogley [1989] 31 Crm R 198 ***(refd)***

Re C and D [1979] 28 ALR 524 ***(refd)***

Re Maryon-wilson's Will Trusts [1968] Ch 268 ***(refd)***

Re P And G (Transexuals) [1996] 2 FLR 90 ***(refd)***

Re S (Minors) (Careorder: Implementation Of Careplan) (HL (E)) [2002] 2 AC 291 ***(refd)***

Re T [1975] 2 NZLR 449 ***(refd)***

Rees v. United Kingdom [1987] Family Law 157 ***(refd)***
Richardson v. Bardenhagen Enterprise Pty Ltd [1971] Tas SR 307 ***(refd)***
Secretary, Department Of Social Security v. SRA [1993] 118 ALR 467 ***(refd)***
Sheffield And Horsham v. UK [1998] 2 FLR 928 ***(refd)***
Siskina (Cargo Owners) v. Disstoss SA [1979] AC 210 ***(refd)***
Sundralingam v. Ramanathan Chettiar [1967] 2 MLJ 211 ***(foll)***
The Cossey case [1991] Fam Law 362 ***(refd)***
The King v. Banbury I AD & E 136 1159 ***(refd)***
Thein Tham Sang V. United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 ***(refd)***
Transsexualism And Marriage [1970] 120 New LJ 210 ***(refd)***
W v. W [1976] 2 SALR 310 ***(refd)***
Warburton v. Loveland (1831-32) II DOW & CI.ARK 806 ***(refd)***
Wilson v. First County Trust Ltd [2003] All ER (D) 187 ***(refd)***
Workon Sdn Bhd v. The Director Of Lands And Surveys, Sabah [1999] 4 MLJ 177 ***(foll)***

Legislation referred to:
Births and Deaths Registration Act 1957, ss. 7, 27(1), (3)
Courts of Judicature Act 1964, s. 25
National Registration Act 1959, s. 6(2)(h), (o)
Specific Relief Act 1950, ss. 41, 44

For the applicant - Mohamad Asri Othman; M/s Asri Chek Ming & Co
For the respondent - Mohamad Abazafree Mohd Abbas SFC

Reported by Usha Thiagarajah

JUDGMENT

VT Singham J:

At the outset of the decision, it is important to observe that this case involves a sensitive subject in which the applicant has sought the assistance of the court to declare the applicant as a man and to direct the Registrar General or Director General of the National Registration Department Malaysia or his representatives or employees to amend or correct the Birth Certificate and the National Registration Identity Card of the applicant to give effect that the applicant is a male. Nevertheless, this court will not abdicate or shrink from its duty and will endeavour to confine its reasoning and decision within the limits and contexts of the application. In any event, this case clearly illustrates the serious difficulty faced by the applicant and starkly demonstrates the quandary the law or the extreme perplexity in reference to the status of transsexuals in this jurisdiction. It is clear from the materials before this court that the applicant has an overwhelming concern to be recognized in her identity

as a man. However, this court wishes to emphasise that this case is not concerned with the determination of sex for the purpose of marriage or divorce but expressly and only to alter and correct the register in which the applicant's birth was registered under the Births and Deaths Registration Act 1957 and the issuance of the National Registration Identity Card under the National Registration Act 1959.

By an originating summons (encl. 1), the applicant has applied to this court for the following order:

(a) bahawa pemohon diisytiharkan sebagai seorang lelaki dan memerintahkan supaya Pendaftar Besar atau Ketua Pengarah Jabatan Pendaftaran Negara Malaysia atau wakil atau pekerjanya meminda atau membetulkan Surat Kelahiran dan Kad Pengenalan pemohon dengan memberi kesan iaitu pemohon adalah seorang lelaki;

(b) apa-apa relief yang difikirkan sesuai, munafaat oleh Mahkamah yang Mulia ini.

In support of the said application, the applicant has affirmed an affidavit on 16 July 2003 (encl. 2) where it is stated that she was born with two sex organs and that her father had reported her birth to the Registrar of Births as female. On 21 March 2002 and 22 March 2002, Dr. Tan Chee Kuan, a Consultant Psychiatrist of Hospital Lam Wah Ee, Penang who examined the applicant for the purpose of psychiatric evaluation found that mentally the applicant is a male though physically she is female and recommended the applicant for a gender reassignment surgery to being a male. On 8 April 2002, the applicant underwent a sex-reassignment operation from female to male which was carried out by Dr. Khaw Soo Beng Benny, a Consultant Obstetrician and Gynaecologist of the Women and Fertility Centre, Penang.

By an application dated 31 December 2002, the applicant applied to the Registrar General of Births and Deaths at Petaling Jaya to alter the Birth Register and the National Registration Identity Card from female to male so as to indicate the post operative sex on the ground there was an error in the entry at the Register Book. In support of her application, her father affirmed an affidavit that she was born on 4 April 1971 with two sex organs and confirmed that the applicant had gone through a sex reassignment operation from female to male. It is important to observe that the relevant legislation for the registration of Births and Deaths is the Births and Deaths Registration

Act 1957 which provides that the Birth Register may be amended only if an error was made in the initial registering of the birth which in the view of this court was not the case regarding the applicant. (See *Rees v. United Kingdom* [1987] Family Law 157.) The other relevant legislation for the issuance of a National Registration Identity Card is the National Registration Act 1959 (Revised 1972). Section 27(1) of the Births and Deaths Registration Act 1957 expressly states that:

Section 27(1) states:

> No alteration in any register shall be made except as authorize by this Act.

Section 27(2) states:

> Any clerical error which may from time to time be discovered in any register may be corrected by the Superintendent-Registrar, in such manner as the Registrar-General shall direct.

Section 27(3) states:

> Any error or fact or substance in any register may be corrected by entry (without any alteration of the original entry) by the Registrar General upon payment of the prescribe fee and upon production by the person requiring such error to be corrected of a Statutory Declaration setting forth the nature of the error and the true facts of the case, and made by 2 persons required by this Acts to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such person then by 2 credible persons having knowledge to the satisfaction of the Registrar General of the truth of the case; and the Registrar General may if he satisfied of the facts stated in the Statutory Declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.

Section 6(2) of the National Registration Act 1959 (Revised-1972) states:

> Without prejudice to the generality of the powers conferred by sub Section (1), the regulations made provide for:

Section 6(2)(o) states:

> the making of corrections to and alteration in the register and identity card.

However, her application was rejected by the Department of Registration. As the applicant was not satisfied with the decision of the Registrar General of the Births and Deaths and still intended to pursue her wishes in conformity with her current gender status, she filed this application in court.

The submission of learned counsel for the applicant is as follows:

(a) The court has the power to make the declaration under the Courts of Judicature Act 1964 and to direct the Registrar of Births and Deaths to make the necessary corrections in the Register Book of the Births and the National Registration Identity Card from female to male. The National Registration Act 1959 (Revised-1972) and Births and Deaths Registration Act 1957 permits the Registrar General to correct any clerical errors in any register;

(b) learned counsel for the applicant has relied on a case decided by the High Court, Singapore in the case of *Lim Ying v. Hiok Kian Ming Eric* [1992] 1 CLJ 569; [1992] 4 CLJ 442 where the Commissioner of National Registration had changed the particulars of the gender in the Identity Card of the respondent to state her sex as male after she had a sex reassignment operation. In that case, the respondent was born in Singapore on 10 August 1953 and she underwent the gender reassignment surgery in 1983 to be recognized in her identity as a man.

In granting the degree of nullity to the marriage, in *Lim Ying v. Hiok Kian Ming Eric* [1992] 1 CLJ 569; [1992] 4 CLJ 442, His Lordship KS Raja JC (as he then was) *inter alia* held:

(1) the particulars on the Identity Card are not conclusive evidence to establish the fact of a person for the purposes of contracting a valid marriage under the Charter;

(2) a person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for the purpose of a monogamous marriage under the Charter;

(3) the fact that the Commissioner of National Registration permitted a change of particulars did not require the words “man” and “woman” to be given a meaning under the Charter to include persons with the reassigned sex;

(4) the marriage solemnized between the petitioner and respondent was void, *ab initio* by reason that the parties to the marriage were both of the female sex.

However, it is important to distinguish the facts in *Lim Ying v. Hiok Kian Ming Eric* to the facts in the instant case. In that case, the petitioner and respondent were married at the Registry of Marriage at Singapore on 26 July 1990 under the provisions of the Women's Charter (CAP 353) which provides for solemnization and registration of monogamous marriages. However on 29 November 1990, the petitioner-wife filed a petition for divorce on the ground that she believed she was marrying a man and sought a declaration that the marriage solemnized on 26.7.1990 was a nullity. In other words, the petitioner-wife in that case was merely seeking a declaration that her marriage was a nullity. Whereas in the instant case, the declaration sought is for the court to declare the applicant as a man and to direct the Registrar of Births and Deaths and the Director General of the National Registration Department to alter or correct the Birth Certificate and the National Registration Identity Card respectively so as to reflect the applicant's current gender status as a man.

On the other hand, in the instant case, senior federal counsel for the Registrar General of Births and Deaths submitted as follows:

(1) the applicant was born on 4 April 1971 in Ipoh, Perak and the parents had reported to the Registrar of Births and Deaths that the applicant was female and relied on the Birth Certificate of the applicant; (See s. 7 of the Births and Deaths Registration Act 1957 and r. 3 of the Births and Deaths Regulation Rules 1958)

(2) on 5 April 1983, the applicant's father had applied for National Registration Identity Card when the applicant reached age of 12 years and in the prescribed application form he had declared the applicant as female;

(3) on 1 November 1996 when the applicant reached the age of 25 years, the applicant applied for a new Identity Card and in the application declared herself as female; (see s. 6(2)(h) of the National Registration Act 1959 (Revised-1972) and reg. 18 of the National Registration Regulations 1990)

(4) by an application dated 31 December 2002, the applicant applied to the Registrar General of Births and Deaths at Petaling Jaya to alter the Birth Register and the National Registration Identity Card from female to male so as to indicate the post operative sex on the ground there was an error in the entry at the Register Book;

(5) however, the Registrar of Births and Deaths was satisfied that the applicant did not satisfy the requirement of law where it was not shown there was any error of fact or substance in the Register of Births and accordingly by a letter dated 15 September 2003 rejected her application;

(6) the fact of two sex organs is not supported by any evidence and is not shown in the Birth Certificate or the application submitted by the applicant's father for the National Registration Identity Card when the applicant reached the age of 12 years and subsequently the application which was prepared by the applicant herself for new National Registration Identity Card when she reached the age of 25 years;

(7) the letter from the Psychiatrist did not state or confirm that the applicant was born with two sex organs but merely states that she required the reassignment operation on psychiatric evaluation;

(8) there is no law in this country which provides for the mechanism to declare the change of sex;

(9) the Registration of Births and Deaths Act 1957 merely provides for correction in the Register Book if there was any clerical error of fact or substance;

(10) the Birth Certificate and the National Registration Identity Card which was issued did not contain any error but showed the fact as reported by the father and submitted by the applicant respectively;

(11) the fact that there was subsequent change by sex reassignment surgery due to psychological effect are entirely two different things, one, being biological sex at birth and the other psychological gender and it is not a mistake of fact;

(12) therefore, this court has no power to declare the female as male and consequently cannot alter the Register of Births or the National Registration Identity Card.

In opposing the application and urging this court not to grant the declaration sought by the applicant, En. Mohamad Abazafree bin Mohd Abbas, the learned senior federal counsel for the respondent referred to and relied on the following cases where certain passages of the judgments were highlighted:

(a) *R v. North West Lancashire Health Authority, Ex Parte A And Others* [1998] QBD

(b) *Corbette v. Corbette* [1970] 2 All ER 33

(c) *Bellinger v. Bellinger* [2003] 2 All ER 593

(d) *Sheffield And Horsham v. UK* [1998] 2 FLR 928

(e) *Lim Ying v. Hiok Kian Ming Eric* [1992] 4 CLJ 442

(f) *The Cossey* case [1991] Fam Law 362

(g) *Re: P and G (Transsexuals)* [1996] 2 FLR 90

(1) In *Corbette v. Corbette* [1970] 2 All ER 33, Omrod J said:

(i) All the medical witnesses accept that there are at least four criteria for assessing the sexual condition of an individual. These are:-

(i) Chromosomal factors.

(ii) Gonadal factors (that is presence of testes or ovaries).

(iii) Genital factors (including internal sex organs).

(iv) Psychological factors.

Some of the witnesses would add:

(v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are though to reflect the balance between the male and female sex hormones in the body).

(ii) It is important to note that these criteria have been evolved by doctors, for the purpose of systematizing medical knowledge and assisting in the task of deciding the best way of managing the unfortunate patients who suffer, either physically, from sexual abnormalities. As Professor Dewhurst observed, we do not determine sex – In medicine we determine the sex which it is best for the individual to live. These criteria are of course, relevant to, but do not necessarily decide the legal basis of sex determination.

(iii) It is common ground between all the witnesses that the biological constitution of an individual is fixed at birth (at the latest), and cannot changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation,

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> therefore, cannot affect her true sex. *The only cases where the term 'change of sex' is appropriate are those in which a mistake as to the sex is made at birth and subsequently revealed by further medical investigation.* (emphasis added)

Omrod J further said:

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> (iv) If the law were to recognize the 'assignment of the respondent to the female sex, the question which would have to be answered is, what was the respondent's sex immediately before the operation? If the answer is that depends on 'assignment', then if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the 'assignment' to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and capable of 'marrying' a man. The result would be nothing if not bizarre.

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(2) The House of Lords recently in *Bellinger v. Bellinger* [2003] 2 All ER 593 *inter alia* said:

> *A person whose sex had been correctly classified at birth, in accordance with the chromosomal, gonadal and genital tests, could not later become, or come to be regarded as a person of the opposite sex* for the purpose of s. 11(c) of the 1973 Act. *A conclusion to the contrary would represent a major change in the law, having far reaching ramifications.* It raised issues which were pre-eminently matters for Parliament rather than the courts. Much uncertainty surrounded the circumstances should gender reassignment should be considered for the purposes of marriage. Furthermore, the recognition of gender reassignment for the purpose of marriage was part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. Even in the context of marriage, the question raised wider issues. (emphasis added)

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(3) The European Court of Human Rights in *Sheffield And Horsham v. UK* [1998] 2 FLR 928 applied the case in *Corbett v. Corbett* and said:

> Accordingly, the non-acceptance by the authorities of the respondent's state for the time being of the sex of the brain as a crucial determinant of gender cannot be criticized. The court would add that, as at the time of adoption of the cossey judgment, it still remains established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.

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(4) In *Lim Ying v. Hiok Kian Ming Eric* [1992] 1 CLJ 569; [1992] 4 CLJ 442, KS Rajah JC (as he then was) said:

> Reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex and where the sex of person is in issue, it must proved to the satisfaction of the court.

(5) In *The Cossey* case [1991] Fam Law 362, the European Court of Human Rights said:

> The criteria for determining the sex of the person to be registered are not laid down in the 1953 act, nor in any of the regulations made under it. However, the practice of the Registrar General is to use exclusively the biological criteria: chromosomal, gonadal and genital sex. The fact that it becomes evident in life that the person's 'psychological sex' is at variance with these biological criteria is not considered to imply that the initial entry was a factual error and, accordingly, any request to have the initial entry changed on this ground will be refused. Only in cases of a clerical error, or where the apparent and genital sex of the child was wrongly identified or in case of biological intersex, ie, cases in which the biological criteria are not congruent, will a change of the initial entry be contemplated, and it is necessary to adduce medical evidence that the initial entry was incorrect. However, no error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

Decision

In the context of this application, it is important to observe that there must be a distinction drawn between a transsexual, a bisexual, a transvestite and a homosexual. A transsexual refers to a person who has undergone hormonal and surgical treatment to change some of the physical characteristics in order to conform more closely to the opposite sex but the biological bodies and functions of their initial sex remained. A bisexual or an intersexual is a person who has two sexual organs with gonads or genitalia of both sexes. A transvestite is generally understood to be a person who dresses in the clothes of the opposite sex, sometimes refers to cross dressing. A homosexual is a person who are sexually attracted to persons whom they know are of the same biological sex as themselves, generally they are satisfied with the biological sex. (see *Secretary, Department Of Social Security v. SRA* [1993] 118 ALR 467). In the instant case, the medical evidence produced by the applicant did not support that the applicant was born with two sex organs or is an intersexual as raised in the affidavit (encl. 2) of the applicant.

This court is of the view that the threshold questions in the instant case, are:

(a) whether there is any error in the gender of the applicant as initially entered in the Birth Certificate and the National Registration Identity Card. If so, what is the nature of the error;

(b) whether there was a mistake of fact as to the sex of the applicant and if it was made at birth and subsequently revealed by further medical examinations OR whether the change of organs was by medical or surgical means;

(c) whether a person who has undergone a sex change operation can be regarded as belonging to the sex for which reassignment surgery was undertaken for the purpose of correcting the registration of gender of the applicant on the Register of Births and the National Registration Identity Card. ("Infact, the registration of the applicant as a female in the Register of Births must have been based on the biological characteristic of the applicant when she was born");

(d) whether the fact that the sex change operation is permitted, the change of particulars in the Birth Certificate and the National Registration Identity Card required the word "man" and "female" to be given the meaning and includes persons of reassigned sex although the original biological characteristic was female;

(e) whether the reassignment surgery subsequent to the registration of the birth of the applicant and the issue of the National Registration Identity Card to the applicant based on the biological characteristic at the time of birth affects the true sex for the purpose of the Birth Certificate and the National Registration Identity Card;

(f) whether the court has the power on the facts in the instant case to declare a female as male and consequently direct to alter or correct the Register of Births and the National Registration Identity Card on the ground that there is gender assignment surgery. (see ss. 41 and 44 of the Specific Relief Act 1950).

In the instant case, it is important to observe that biological characteristics denotes that the applicant was a female at birth and after sex reassignment surgery physiologically a male. Biological sexual constitution of an individual is fixed at birth. Therefore, the decisive significance in the determination of this application on the identity of the applicant is not the physiological test but the biological test when she was born which is in conformity with the evidence produced by the applicant.

The answers to the six questions posed by this court is as follows:

(a) this court is of the view that there is no error in the sex of the applicant as initially entered in the Register of Births and the Birth Certificate which was issued and accordingly in the National Registration Identity Card to come under s. 27(2) or (3) of the said Act or as envisaged under s. 6(2)(o) of the National Registration Act 1959;

(b) there was no mistake of fact as to the sex when it was registered under the Births and Deaths Registration Act 1957 and when the National Registration Identity Card was issued and it did not reveal that further medical examination showed there was a mistake as to the fact or in the substance at the time of the registration of the birth. Infact the change of organs on the applicant is by medical or surgical means and this is supported by the applicant's own evidence and materials produced before this court;

(c) the person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for the purpose of correcting the registration of sex of the applicant on the Register of Births or the National Registration Identity Card which was already issued;

(d) the fact that the sex change operation was permitted, the change of particulars in the Birth Certificate and National Registration Identity Card does not require the word "man" and "female" to be given the meaning and it does not include persons of reassigned sex and contrary to the biological characteristic when the applicant was born;

(e) the reassignment surgery subsequent to the registration of the birth of the applicant immediately after the applicant's birth and the issue of the National Registration Identity Card to the applicant does not affect the true gender status for the purpose of the Birth Certificate and the National Registration Identity Card as the registration of the applicant's sex at the time the National Registration Identity Card was issued was in accordance with the original identity of the applicant at the time of the birth which was female and accordingly registered in the Register of Births;

(f) on the facts and the materials produced in the instant case, this court has no power to declare the applicant who was born as female as male and consequently to direct the Registrar General to alter the Register of Births and the National Registration Identity Card pursuant to s. 27(3) of the Births and Deaths Registration Act 1957 and s. 6(2)(o) of the National

Registration Act 1959 on the ground that there is gender reassignment surgery as this court finds that there is insufficient materials to support this application. Accordingly, on the facts and the material produced in the instant case, ss. 41 and 44 of the Specific Relief Act 1950 does not assist the applicant and the provisions remain at best merely permissible.

Be that as it may, this court is of the view that there is no express legislation to re-register the gender of a transsexual person or under the disguise of any error or fact or substance in the register pursuant to s. 27(3) of the Births and Deaths Registration Act 1957 and s. 6(2)(o) of the National Registration Act 1959 (Revised-1972) as it would be contrary to the object and whole spirit of statutory interpretation and legal principle on which the judicial system is built. This court wishes to reiterate that the court's observation on the declaration sought by the applicant and the order to direct the Registrar General of the Births and Deaths and the National Registration Identity Card is confined strictly to the set of facts and the materials produced in the instant case.

In *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183, Abdul Hamid Omar LP speaking for the Supreme Court said:

> "The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law ..." "Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions."

In *The King v. Banbury* I AD & E 136 1159 at p 1161 Patteson J observed:

> … the case must be decided according to the plain sense of the words used by the legislature.

In that case Parke J observed:

> … I am not sure whether we shall fulfil the intention of the legislature; it has often happened that we have been unable to do so throughout a series of decisions. Still the rule of construction which the court must follow is, to intend the legislature to have meant what they have actually expressed, unless a manifest incongruity would result from doing so, or unless the context clearly shews that such a construction would not be the right.

In *Warburton v. Loveland* (1831-32) II DOW & CI.ARK 806, Tindal, Ld Ch J said:

> … It must therefore be determined upon principle, not upon authority; and the only principle of decision that is applicable to it is the fair construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference in all cases where a doubt arises to the object which the legislature had in view when the statute was passed. Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the legislature. If in any case a doubt arises upon the words themselves, we must endeavour to solve that doubt by discovering the object which the Legislature intended to accomplish by passing the Act.
>
> And although it would be impossible to consider a question to be free from difficulty where opinions have been formed upon it in direct contradiction to each other, and each opinion has been supported with such acuteness and ability by the very learned judges of the several courts below, before which it has been agitated; yet we have, upon consideration, come to the conclusion, that both the closer interpretation of the words of the statute, and the construction which, at the [490] same time, most suppresses the mischief the Legislature had in view, and most advances the remedy which is held forth …

In *Lee Boon Tuan v. Public Prosecutor* [1960] 26 MLJ 179 at p 180, His Lordship Ismail Khan J (as he then was) said:

> The function of the court is limited to interpretation.

In *Cartledge & Ors. v. E. Jopling & Sons Ltd.* [1963] AC 758 at p. 782, Lord Pearce said:

> One must prefer a construction of its intention which produces a fair and sensible result, but inevitably in certain cases it creates hardship. (See per Scrutton LJ in *Harnett v. Fisher* [1927] 1 KB 402 at p. 422)

In *Re Maryon-wilson's Will Trusts* [1968] Ch. 268 at p. 282, Ungoed-Thomas J said:

> If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice.

In *Corocraft Ltd & Anor v. Pan American Airways Inc* [1969] 1 QB 616 at 638, Donaldson J (as he then was) said:

> The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.

In *Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v. Transport Workers' Union* [1971] 1 MLJ 102 at p. 105, His Lordship Gill FJ said:

> The basic rule of interpretation is that words used in an enactment must be understood in their proper context.

In *Richardson v. Bardenhagen Enterprise Pty Ltd* [1971] Tas. SR 307, His Lordship Burbury CJ said:

> … If, by permissible processes of statutory interpretation, the court cannot say that what is omitted is necessarily implied within the language it cannot legislate by filling in gaps which the legislature has left.

In *Black-clawson International Ltd v. Papierwerke Waldhof-aschaffenburg Ag* [1975] 2 WLR 513 at 517, Lord Reid said:

> construction of the provisions of an Act is for the court and for no one else. This may seem technical but it is good sense.
>
> … We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

In *Siskina (Cargo Owners) v. Disstoss SA* [1979] AC 210 at p 240, Bridge LJ observed:

> ... the court should exercise severe self-restraint to avoid the temptation, under the guise of construction to engage in what if in fact legislation.

In *Re S (Minors) (Careorder: Implementation Of Careplan) (HL (E))* [2002] 2 AC 291 at 313, Lord Nicholls of Birkenhead said:

> Interpretation of statutes is a matter for the courts; the enactment of statutes and the amendment of statutes, are matters for Parliament.

In *Wilson v. First County Trust Ltd* [2003] All ER (D) 187, Lord Hope of Craighead said:

> … legislation, is the exclusive responsibility of Parliament. The judges' task is to interpret, not to legislate.
>
> Another is that it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the executive. The courts for their part must respect this principle which means that the legislative function belongs to Parliament and not to the executive.

Lord Nicholls of Birkenhead said:

> … all courts are keenly aware of the importance of the legislature and the judiciary each discharging their own constitutional roles and not trespassing into functions that belong to the other.

This court is of the view that if the application is decided in favour of the applicant, this court would usurp the function of Parliament and it is trite that that is something that the courts must not do as it is not the function of the court to substitute its own views to fill gaps in the statute but merely to interpret each phrase in the statute in its statutory context. The human and practical trend to accept the reality of gender reassignment would depart from the proper approach of construing the Births and Deaths Registration Act 1957 and the National Registration Act 1959. The applicant cannot ask this court to read into both the said Acts words which are not included.

The registration of birth of every child born in Malaysia is governed by the Births and Deaths Registration Act 1957. Section 7 of the Act requires that the birth of every child shall be registered by the Registrar of Births and Deaths for the registration area in which the child was born. An entry in the Register of Births is regarded as a record of the fact at the time of birth. Accordingly, the Birth Certificate constitute a document revealing not current identity but historical facts. A Birth Certificate which was issued to the applicant is a document which revealed not the current identity of the applicant but historical facts when she was born and where she was accordingly registered. (See *Bellinger v. Bellinger* [2003] 2 All ER 593). Therefore, on the facts and circumstances in the instant case, there have been no error of fact or substance which has been made so as to bring the applicant's case within the statutory words in s. 27(3) of the Births and Deaths Registration Act 1957 and the National Registration Act 1959. The Birth Certificate and the National Registration Identity Card issued to the applicant are official documents and both serve different purposes. In this context, it is important to state that while ss. 41 and 44 of the Specific Relief Act 1950 provides for the applicant to seek declaratory decree or relief and mandamus order respectively as prayed in this application (encl. 1), however it does not give the discretion to the court to override the express provision of the statute and

to grant the relief sought by the applicant even if the declaratory order may eliminate anxiety of having to live under the cloud of uncertainty of fear. In *Guaranty Trust Company Of New York v. Hannay & Co.* [1915] WN 38, His Lordship Bailhache J said:

> … a declaration would not be made merely because the person asking for it feared that at some time or other he might be liable to an action, and desired to put an end to a position of uncertainty or of suspense and anxiety;

In *Julius v. Bishop Of Oxford* 5 App. Cas 214 at p. 225, Lord Cairns said:

> that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised. (see *Padfield And Others v. Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997)

In the instant case, the criteria for determining the sex of the person to be registered are not laid down in the 1957 Act or in any of the regulation made under it. However, the practice of the Registrar General is to apply exclusively the biological criteria, chromosomal, gonapal and genital sex as notified by the parents or guardian of the child. The fact that it becomes evident later in life that the person's 'psychological sex' is at variance with these biological constituent cannot be considered to invoke s. 27(3) of the Births and Deaths Registration Act 1957 so as to imply that the initial entry was a factual error. Accordingly, any application to have the initial entry changed on this ground or circumstances shall be refused. It is only in cases of a clerical error or any error of fact or substance or whether the apparent and genital sex of the child was wrongly identified at the time of birth or in the cases of biological intersex, ie, cases in which the biological criteria are not congruent, will a change of the initial entry be contemplated and for this purpose it is necessary to adduce medical evidence that the initial entry was incorrect on the basis that the applicant was a bisexual or biological intersex. However, in the instant case and on the facts, no error can be considered to have existed in the birth or the registration of the birth of the applicant who according to the materials before this court has undergone medical and surgical treatment to enable the applicant to assume the role of the opposite sex physiologically or psychologically. Accordingly, there is no factual or legal basis to direct the Director General to alter or correct the Register of Births and the National Registration Identity Card. Infact, this case is not where the Registrar of Births or the Director-General of the National Registration Department possibly can be controlled by mandamus as the Registrar and the Director-General

respectively themselves have no statutory power or discretion to grant the application. Powers given under the particular provision of the Specific Relief Act 1950 must be exercised judicially and within the limits and in the spirit of the particular legislation, in the instant case, the Births and Deaths Registration Act 1957. (See *The Cossey* case (European Court of Human Rights [1991] 2 SLR 492) (See *Re: P and G (Transexuals)* [1996] 2 FLR 90.) In fact Parliament could not have envisaged the type of grievance as faced by the applicant when the Births and Deaths Registration Act 1957 and the National Registration Act 1959 was introduced to facilitate registration of Births and the issuance of the National Registration Identity Card.

In the instant case, it is important to observe that there is no law (which includes statute law and common law) which governs the registration of transsexual in this country. This court must therefore be careful that the decision to be made on this application is not in conflict with the spirit and intention of the legislature as expressly stipulated in the Births and Deaths Registration Act 1957. This court cannot and will not travel outside the statutory law or power as provided which is basically for the registration of Births and Deaths and there is no provision in law to register or re-register transsexual when they have already been registered at birth under the Births and Deaths Registration Act 1957 unless there was error of fact or substance at the time of registration of birth. The power of this court to make an order to direct the public officer to perform his public duty is discretionary provided there is an express and clear duty imposed upon the officer in their duty to perform. (see s. 44 of the Specific Relief Act 1950 to be read with s. 25 of the Courts of Judicature Act 1964 read with para. 1 of the schedule). The Registrar and the Director-General cannot be subjected to judicial control in respect of the declaration sought by this application (encl. 2) as the Registrar and the Director-General themselves have no statutory power or discretion to entertain the said application of the applicant and any such change or amendment must be introduced by Act of Parliament and cannot properly be made by judicial decision.

On the facts in the instant case, the applicant has also not satisfied the pre-requisites cumulatively essential for the issuance of the declaration and order sought in this application as set out in the provision to ss. 41 and 44 of the Specific Relief Act 1950. (see [1] *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ 180, [2] *Loh Wai Kong v. Government Of Malaysia & Ors* [1978] 2 MLJ 175 (HC), [1979] 2 MLJ 37 (FC), [3] *Thein Tham Sang v. United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97, [4] *Hong Leong Enterprise Sdn. Bhd. v. Liew Fook Chuan & Anor Appeal* [1997]

1 CLJ 665 (CA), [5] R. *Ramachandran v. The Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147, [6] *Workon Sdn. Bhd. v. The Director Of Lands And Surveys, Sabah* [1999] 4 MLJ 177).

It is important to note that in some of the reported Australian cases there is legislation in place which provides for transsexuals to have their record of birth reflect their reassigned sex which has the effect that the person is of the same sex as so altered which does not exist in this jurisdiction. Although decisions in other jurisdiction may in some cases assist the court in arriving at its decision but those cases cannot be applied and read in isolation and must be read together with the statutory provisions of each statute applicable in this jurisdiction and according to settled legal principles on statutory interpretation. In South Australia, the legislature has enacted the Sexual Reassignment Act 1988 (SA) as on 5 May 1988 for gender sexual reassignment cases. The Act regulates the carrying out of sexual reassignment procedure and provides for the recognition by law of the reassigned sex of a person who has undergone a reassignment procedure. In those cases, the person may then apply to a Magistrate for the issue of a 'recognition certificate'. The certificate will identify the person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned and the recognition certificate is conclusive evidence of the sex stated in the said certificate. The recognition certificate is produced to the Principal Registrar of Births, Deaths and Marriages of South Australia. The Registrar must register the reassignment of sex and make such other entries and alterations on any register or index kept by the Registrar as may be necessary in view of the reassignment. (see *Secretary, Department Of Social Security v. SRA* 1993 118 ALR 467).

In *Re: T* [1975] 2 NZLR 449, McMullen J of the Supreme Court of New Zealand held that the court lacked jurisdiction to make a declaration as to the sex of a transsexual who was registered at birth as a male but had undergone a sexual reassignment surgery and lived as a female. His Lordship said it was for the legislature to determine whether genuine transsexuals should be given the opportunity to obtain legal recognition of a:

> … state which reflects both their own inborn physiological make-up and the medical and surgical changes which they have undergone to make that state more certain.

In the South African case of *W v. W* [1976] 2 SALR 310 held that a marriage was invalid where the wife was a post operative male-to-female transsexual. Nestadt J said:

> … Imitation cannot be equated with actual transformation if what I may call this pseudo-type of woman is, for the purposes of marriage, properly to be regarded as a female, then, in the absence of medical evidence justifying such a finding, the intervention of the legislature would be necessary.

In Australia the same issue was discussed in *Re: C and D* [1979] 28 ALR 524, Bell J observed:

> In this case, the husband, after surgery, exhibited as a male in two or three criteria. However the chromosomal indications are that he is a female. This matter loomed large in the minds of the medical practitioners who carried out the surgical procedures upon the husband and their opinions were that he should be transformed into a male rather than a female since he had for a considerable number of years been treated as a male. Subsequent medical practice appears to casts some doubts upon this.

In *R v. Cogley* [1989] 31 Crm R 198, Cummins J of the Supreme Court of Victoria said:

> … the law should regard as a woman, a male-to-female transsexual, where core identity is established (ie, the psychological personality or character of the person concerned) and where sexual reassignment surgery has taken place. (See *R. v. Harris and McGuiness* [1988] 17 NSWLR 158).

In *Attorney-general For The Commonwealth (Appellant) And 'Kevin' And 'Jennifer' (Respondents) And Human Rights And Equal Opportunity Commission (Intervener)* [2003] Fam CA 94, the Full Court of the Family Court of Australia at Sydney confirmed on 21 February 2003 the decision of His Lordship Chisholm J that, for the purpose of ascertaining the validity of a marriage under Australian Law the question of whether a person is a man or a woman is to be determined as at the date of the marriage and that in the context of the rule that the parties to a valid marriage must be a man or a woman, the word 'man' has its ordinary current meaning according to Australian usage. In this Australian Family Court case both the parties went through ceremony of marriage on 21 August 1989 and thereafter lived together as married couple from the date of marriage. The husband was a post operative transsexual person, who at his birth was registered as a female. On 18 October 1999, the respondents filed an application seeking a declaration of the validity of their marriage pursuant to the provisions of s. 113 of the Family Law Act 1975. The Attorney-General intervened in those proceedings before the High Court Judge. Both the respondents and the Attorney-General accepted that a valid marriage for the purpose of the Marriage Act 1971 must be between a man and a woman. The respondents submitted that at the relevant time, namely, the date of marriage Kevin was a man for the purpose of the marriage

laws of Australia and that the court should declare that their marriage was valid. The Attorney-General submitted that Kevin was not a man for the purpose of the marriage laws and that the respondents' application for a declaration should be dismissed. However, the respondents did not assert either before the trial judge or before the appeal court that Australia Laws recognizes marriage between people of same sex and contended that at the date of marriage, Kevin was a man and accordingly their marriage was valid. The trial judge Chisholm J (see [2001] 28 Fam LR 158) held that for the purposes of ascertaining the validity of the marriage under Australia Law, the question of whether a man or a woman is to be determined as the date of marriage and in the context of the rule that parties to a valid marriage must be a man or woman. Accordingly, it was held that Kevin was a man for the purposes of the law of marriage at the date of marriage.

In that case, *Kevin* applied to the Registration of Births, Deaths and Marriages to have his reassigned sex from female to male noted on the Register of Births pursuant to the provisions of s. 32B of the Births, Deaths and Marriages Registration Act 1995 (NSW). It is important to state that subsequent to the medical procedure and processes, Kevin is recognized under the Laws of New South Wales where he resides as a man for various purposes. In that case, Jennifer had a child and at the time of hearing of the appeal was about to give birth to another child. One of the grounds for the declaration for the validity of the marriage that it will be in the best interest of the children as the status of marriage afforded benefits and protection to the children and that that course would be consistent with the recognition of Australia's obligation under the United Nations Convention on the right of the child. Further, the convention was a declared instrument pursuant to s. 47(1) of the Human Rights And Equal Opportunity Commission Act 1986. It is important to observe that the Births, Deaths and Marriages Registration Act 1995 of New South Wales, Australia has express provisions for registration of transsexual person. The object of the act includes the registration of "changes of name and recording of changes of sex". An adult whose birth is registered at New South Wales, who has undergone sexual reassignment surgery and who is not married may apply for alteration in the record of the person's sex in the registration of the person's birth. The application is to be accompanied by Statutory Declaration by two Medical Practitioners. The new Certificate which is issued and which contains the person's altered sex must not include a statement that the person has changed sex. The legislation being the registration of transsexual does not exist in our jurisdiction. The legislative provisions in that jurisdiction supports the view that there is no insuperable objection to the law recognizing the changed sex of a person who has undergone a gender reassignment procedure but however, that legislation is limited to persons who are unmarried.

Accordingly, it is the view of this court that the facts, circumstances and the law applied to Kevin's case was decided in the context of the Australian law and must be distinguished and is not binding in this jurisdiction which has no specific legislation. The cases referred to as above and decided in other jurisdiction cannot be applied or persuaded to apply to suit the social and psychological need of the applicant as those cases were decided in reference to specific and express legislation which were available in that jurisdiction and which were accordingly applied. However, in the instant case, the applicant's problem or dilemma cannot be solved judicially by granting extended meaning or interpretation to s. 41 or 44 of the Specific Relief Act 1950 and it must be left to Parliament as if the court were to stretch backwards to entertain this application, it would be encroaching into the legislative exercise and beyond its permissible limits of amendment to the existing laws or making new legislation which is entirely the function of Parliament. On the facts in the instant case, there is no evidence that the applicant had acquired all the biological characteristic of the assigned sex after the reassignment surgery. Biological characteristic must include (i) chromosomal (ii) gonadal (presence of testes or ovaries and (iii) genital (which includes internal sex organ).

As for the case relied on by learned counsel for the applicant Teh Hon Kam @ Teh Ywai Chong (P) in Ipoh High Court Originating Summons No: 24-595-2002 granted on 2 July 2002 by His Lordship Abdull Hamid bin Embung J it is important to distinguish that case with the facts in the instant case. In that case, although the application was similar in nature, the application was heard *ex parte* without having named the Registrar General of the Births and Deaths or any person as the respondent and granted *ex parte* and without having the benefit of legal arguments as was raised in the instant case by learned counsel for the applicant and learned Senior Federal Counsel for the Registrar General of the Births and Deaths. Accordingly, the circumstances in which the Order was granted *ex parte* in that case, with respect is not followed when considering the facts, circumstances and arguments in the instant case and has to be distinguished. (see *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211 at p. 213)

Generally, negative attitudes towards transsexuals are based fundamentally on religious and moral views and those assumptions appear to be slowly changing in modern society in other jurisdiction but whether that modern perception could be accepted in this jurisdiction is left open although judicial opinions in this area of the law is expected to be liberal and the consideration should be what is in the best interests of society at large and the transsexuals. Nevertheless, the court's function in the instant case and on the facts is to interpret the Births and Deaths Registration Act 1957 and the National

Registration Act 1959 and to consider whether the applicant's case falls under the category of any error of fact or substance in the register in order to direct the Director-General to correct the identity of the applicant's sex and the court cannot stretch its judicial powers however wide it may be and according to its whims but should only be in accordance with established legal principles on statutory interpretation in order to be in conformity with statutory interpretation. For social and official purposes, the applicant is seeking to be recognized physically and physiologically as a man and the case rest wholly on the peculiar set of facts in the instant case. Generally, this court has the discretion to grant declaratory relief but in the instant case there is insufficient evidence to support that the applicant's gender has been changed biologically to male but physically and physiologically as a man. Although the applicant and the transsexuals cannot be left to live in legal limbo but however the remedy for registration as to their current gender is with Parliament and not the courts as any fact changed in the registration of transsexual must be introduced by Act of Parliament and cannot probably be made by judicial pronouncement. This court cannot arrive at the construction conformable with the contention of the applicant's counsel that the Registrar General be directed to alter or correct the Register of Births which no doubt will be against the scope and express words of the provision in s. 27(3) of the Births and Deaths Registration Act 1957.

Nevertheless, it is also important to observe that the general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised "sparingly", with "great care and jealously", with "extreme caution", with "utmost caution". (see *Ikebife Ibeneweka & Ors v. Peter Egbuna & Anor* [1964] 1 WLR 219 at p. 224 (PC). The powers of this court to grant declaratory orders are limited to legal and equitable rights and it cannot be extended to moral, social of political matters. (See *Letchumanan Nagappan v. Nadarajah* [1993] 4 CLJ 253). In *Mohamed Noor bin Othman & Ors v. Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 at p. 84, Hashim Yeop A. Sani SCJ (as he then was) said:

> It is also an established principle consistently followed by our courts that the issuing of a declaration is discretionary. The power to issue a declaration should be exercised with circumspection with a proper sense of responsibility and ought not to be exercised unless the circumstances justify it. See also the speech of Viscount Radcliffe in the Privy Council in *Ibeneweka v. Egbuna* and *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi.*

Be that as it may, post-operative transsexuals should not be denied by society the inner peace of life which is their right. R Gree said in "*Transsexualism and Marriage"* [1970] 120 New LJ 210:

> What does it comfort any of us to insist that an individual shall be a man, when for all the purposes of ordinary life that individual can only be, and be recognized as a woman? What pride can there be for a law which vetos the attitudes dictated by ordinary humanity?

In *MT v. JT* 355 A 2nd 204 (1976) the Appellate Division of the Superior Court of New Jersey attached great significance to the sexual and reassignment surgical surgery where the court observed:

> Such recognition will promote the individuals' quest for inner peace and personal happiness, while in no way disserving any societal interest, principle or public order or precept of morality." (See *R v. North West Lancashire Health Authority Ex Parte A & Others* [1998] QBD)

Transsexuals should be given an opportunity to lead normal lives and change their gender status after they have undergone reassignment surgery and the necessary legislation be introduced in order to enable them to change their gender from female to male or vice versa in their personal documents so as to enable their "individual quest for inner peace and personal happiness" so long as it is not detrimental or a disservice to the societal interest at large or breaching the social interest of public order or percept of morality. On the other hand, it cannot be disputed that the sex of post operative transsexuals may raise serious issues of human rights but that is not a matter for this court to decide. Pre-operative transsexual persons female to male and that they be considered and recognized as male would involve fundamental change to the law and may require legislation. The social, psychological, physiological and matters are irrelevant in determining whether this application should be allowed to direct the Registrar of Births and the Director-General of the National Registration to alter the register so as to accommodate the applicant's gender reassignment surgery to male as both the Acts did not envisage such a situation as in the case of the applicant.

There is an increase recognition of the problem which post operative transsexual encounter and this cannot be disregarded and require legislation. Transsexual are no doubt compelled to describe themselves in public by a gender which truly does not accord with their external appearance and is a cause of "profound embarrassment and distress" and they are bound by the information contained in the Birth Certificate and National Registration Identity Card which is contrary to their present external appearances which has come about because of the post operative surgical treatment and places them as transsexuals.

a In the circumstances and on the set of facts in the instant case, this court is satisfied that the court ought not to entertain the application for a declaration of this nature. Accordingly, this court with regret has no alternative but to decline and dismiss the application. The application is dismissed. Each party is to bear its own costs.

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